SPANISH AND MEXICAN PRIVATE LAND GRANTS

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When James K. Polk became President of the United States on March 5, 1845, diplomatic relations between the United States and Mexico had been suspended. The Mexican Minister had demanded his passports a few days before from the Secretary of State of the previous administration, and with this demand had sent a leave-taking note in which he angrily charged that the United States had assumed a hostile attitude toward his country in the annexation of Texas, referring to the Joint Resolutions of Congress providing for such annexation, approved March 1, 1845 (5 Stat. 797).

In this situation of affairs, Polk formed a definite and decided policy with respect to his dealings with Mexico. He proposed, among other things, to acquire New Mexico and Upper California by purchase. In an entry in the President's diary under the date of September 17, 1845, he states that on that day he had announced clearly to his cabinet that he would try to adjust through the Texas question a permanent boundary between Mexico and the United States, so as to comprehend Upper California and New Mexico and to give us a line from the mouth of the Rio Grande to latitude 32 degrees north, and thence west to the Pacific. For such a boundary he was willing to pay, he said, $40,000,000, but he could probably get it for $15,000,000 or $20,000,000. To these views the cabinet unanimously concurred. (American Diplomacy Under Tyler and Polk, by Reeves, p. 272.)

Negotiations pursuant to this purpose were attempted, but failed to accomplish any immediate substantial result. A controversy was then in progress concerning the boundary between the two countries, brought about by the annexation of Texas. The United States claimed to the Rio Grande, while Mexico claimed that the boundary between that country and Texas had been the Nueces River.

Conflict With Mexico.

President Polk, in support of the claim of this country, ordered General Taylor to cross the Nueces and occupy its western bank with a force of United States troops, and later the President ordered General Taylor to advance to the Rio Grande to a point opposite the Mexican town of Matamoras, which he did. The general in command of the Mexican forces at that point demanded that General Taylor should withdraw to the Nueces River. This General Taylor refused to do, and thereupon a Mexican force under the command of General Arista crossed the Rio Grande. A collision occurred between the two forces, resulting in the defeat of the Mexicans at Palo Alto on May 8th, and at Resaca de la Palma on May 9th. On May 13, 1846, Congress passed the act declaring war with Mexico, and on the same day the President issued a proclamation to that effect. The forces of the United States proceeded to occupy the territory of New Mexico and to prosecute the war upon Mexican soil.

Occupation of California.

On July 7, 1846, Commodore Sloat, in command of the Pacific Squadron, pursuant to instructions from the Navy Department, landed at Monterey, in this State, hoisted the American flag at that place,* and gave notice that he would carry it through California.

*See Introduction to California Jurisprudence, vol. I.

In Commodore Sloat's proclamation to the people of California he declared that the territory would be a portion of the United States, and its peaceable inhabitants would enjoy the same rights and privileges as the citizens of any other part of the nation then enjoyed. He also announced that "All persons holding titles of real estate, or in quiet possession of lands under a color of right, should have their titles and their rights guaranteed to them." This proclamation was in accordance with the principles of modern international law, but the reaffirmance of protection of private rights naturally had a very quieting effect upon the inhabitants of this part of the territory, and it was not long before all opposition to the occupation of California by the forces of the United States ceased.

The conquest of New Mexico was accomplished with equal promptness and even less opposition. On June 26, 1846, General Stephen W. Kearny set out from Fort Leavenworth, Kansas, under the direction of the War Department, with a force of 1,657 men for Santa Fe, the capital of New Mexico. He arrived at that point and entered the city on August 18, 1846, without firing a gun or spilling a drop of blood; he took possession of the capital of the territory, hoisted the stars and stripes on the flagstaff over the Governor's palace, and on August 22, 1846, issued a proclamation claiming the whole department with its original boundaries as a part of the territory of the United States.

In September, with a small part of his command, General Kearny took up his march for California, where he arrived in December, and became the first military Governor of the territory, having been preceded by Commodores Sloat and Stockton as naval commanders.*

*Kearny Street in San Francisco was named in honor of General Stephen W. Kearny, and not General Philip Kearny as some have supposed, nor was it named for Dennis Kearney, the sand-lot agitator, as some have facetiously suggested.

With the progress of this war and its details we have nothing to do, and I purposely omit reference to the underlying political questions involved in the prosecution of the war. We are only concerned with certain questions relating to the Spanish and Mexican private land grants in this newly acquired territory. California and New Mexico had then been acquired by practically a peaceful conquest, welcomed by the inhabitants. This conquest was, however, subject to the policy, judicially and politically declared, that a war will not be prosecuted by our government for the acquisition of territory. (*Fleming* v. *Page,* 9 How. 614; *De Lima* v. *Bidwell,* 182 U. S. 1; *Dooley* v. *United States,* 182 U. S. 222; *Downes* v. *Bidwell,* 182 U. S. 244; *Hawaii* v. *Mankichi,* 190 U. S. 197.) The most that can be said is that military occupation of foreign territory may be made with the expectation and purpose that it shall be retained and its cession demanded and secured by treaty as an indemnity for injuries and expenses. (*Palmer* v. *United States,* 1 Hoff. 249, 254.) This was the policy pursued by our government in dealing with Mexico in the war of 1846–48.

Treaty of Guadalupe Hidalgo.

The war was ended by the treaty of Guadalupe Hidalgo, signed on February 2, 1848 (9 U. S. Stat. 922). In this treaty it was provided that the United States should pay Mexico $15,000,000. The United States also assumed the payment of certain claims which had long been due citizens of the United States by Mexico, amounting to $3,250,000. Mexico waived all claim to Texas, and the Rio Grande was established as the southwestern boundary of the United States. This boundary admitted that the provinces of New Mexico and California had become a part of the territory of the United States. The treaty provided, in articles VIII and IX, full and complete protection for all property rights of Mexicans, whether residing in the ceded ter-

ritories or elsewhere.* The treaty stipulation was not necessary for such protection. As said by Chief Justice Marshall in *United States* v. *Percheman* (7 Peters, 50, 86), "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed." As again said by the Supreme Court in *United States* v. *Moreno* (1 Wall. 400, 404), such rights "were consecrated by the laws of nations. . . . The treaty stipulation was

*Article VIII provides: "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever. Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States. In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

Article IX provides: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

but a formal recognition of the pre-existing sanction in the law of nations."

Rejection of Article X of the Treaty.

But the treaty, as originally agreed upon by the representatives of the two countries, contained a special article respecting Mexican land grants in the ceded territories. As this article was struck out by the United States, on the recommendation of the President, and is not contained in the published treaties, it is here inserted for convenience of reference:

ARTICLE X.

All grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, *to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico.* But the grantees of lands in Texas, put in possession thereof, who, by reason of the circumstances of the country, since the beginning of the troubles between Texas and the Mexican government, *may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited in the same, respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty;* in default of which the said grants shall not be obligatory upon the State of Texas, in virtue of the stipulations contained in this article.

The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid, elsewhere than in Texas, put in possession under such grants; and, in default of the fulfillment of the conditions of any such grant, within the new period, which, as is above stipulated begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.

The Mexican government declares that no grant whatever of lands in Texas has been made since the second day of March, one thousand eight hundred and thirty-six; and that no grant whatever of land, in any of the territories aforesaid, has been made since the thirteenth day of May, one thousand eight hundred and forty-six.

The striking out of this article, and certain amendments made to others by the Senate, made it necessary to send commissioners to Mexico to procure the ratification of the treaty as amended. The ratification was obtained without difficulty; but the commissioners signed a so-called protocol in which explanation was made of the changes made in the treaty, and, among others, the striking out of article X. The explanation with respect to that article was, that "The American government, by suppressing the Xth article of the treaty of Guadalupe, did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess; *and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.*"

In transmitting the treaty to the Senate, the President had made two objections to article X: First. That the public lands within the limits of Texas belonged to that State, and the United States had no power to dispose of them, or to change the conditions already made. Second. With respect to land in the other territories, it was unnecessary, as all valid titles to land in such territories were unaffected by the change of sovereignty. It was subsequently objected that the provisions of the article could only serve as an effort to revive titles that had lapsed under Mexican laws.

Basis of Payment to Mexico—The Land Situation.

Why then did we pay Mexico $18,250,000, under the stipulations of this treaty? Was it for indemnity for injuries and expenses? Such a claim might have been made by us, but we made none. We waived whatever right we had on that score, and there was nothing for which indemnity could possibly be claimed by Mexico. Our military operations had been successful, and at every stage of their progress we had proposed a peaceful and honorable adjustment of our difficulties, without success, until further resistance on the part of Mexico was no longer possible.

The possession of the harbors on the California coast was, of course, a consideration. Was there any other? Was it for the supposed public lands in the ceded territory? It was not known that there were such lands of any material value. It had been reported that the most desirable lands in the territory had been granted away in large tracts and were held in private ownership; this fact was disclosed by the rejected article of the treaty. In reply to certain resolutions of the House of Representatives at Washington requesting information in relation to the ceded territories, the President in a message to that body on July 24, 1848, stated that the Executive Department had no means of making an accurate estimate of the public lands in these territories. He stated, further, that the period since the exchange of ratifications of the treaty had been too short to enable the government to have access to, or to procure abstracts or copies of the land titles issued by Spain or by the Republic of Mexico; but that steps would be taken to procure such information at the earliest practicable period. The President stated, however, that it was estimated that much the larger portion of the land within the territory had remained vacant and unappropriated and would be subject to be disposed of by the United States. "Indeed," said the President, "a very inconsiderable portion of the land embraced in the cession, it is be-

lieved, has been disposed of or granted, either by Spain or Mexico." But, notwithstanding this favorable view of the land situation in the ceded territories entertained by the President, public opinion was in doubt upon the subject. It was believed that whatever lands there were of value in the country had been already appropriated by private grants, and with respect to the remainder there had been many adverse reports by travelers and others as to their value for any purpose. It was known that a large part of the surface was broken by lofty mountain ranges, other parts were arid and dead to all forms of plant life, while other parts supported only the weird life of the Apache, the cactus and the serpent.

But still the mountains might contain valuable minerals, and the valleys productive soil. Had it all been appropriated, or was it still open to exploration and settlement? Was it in fact a new country for such people, for instance, as had gone into the Mississippi Valley? Was it a land for settlers?

The fact is, we paid Mexico for the newly acquired territory because it was the honorable and just thing to do, and because of the possibilities arising out of the undeveloped resources of the country. This territory had long been in the possession of the Mexican people, first under Spanish and later under Mexican rule, and it was reported that these people had spied out the desirable locations and appropriated them in large tracts, under a simple form of procedure, for pastoral and other primitive purposes. This was the probable fact. Whether it was or not was a question of the utmost importance to those who wished to try their fortune in this newly acquired territory, particularly in California after the discovery of gold, when a tremendous immigration commenced to pour into the territory from all quarters of the globe.

Investigation of California Land Titles—The Jones Report.

The first step was taken when General Mason, Military Governor of California, instructed H. W. Halleck, Secretary of State [afterward General Halleck of the Civil War], to collect together and examine all the archives of the old government of California that could be found and to report on the same. This report was made on March 1, 1849: (1st) On the laws and regulations which govern the granting or selling of public lands in California; (2d) on the laws and regulations respecting the lands and other property belonging to the missions of California; and (3d) on the titles of lands in California which might be required for fortifications, arsenals and other military structures for the use of the government of the United States. (House Ex. Doc. No. 17, 31st Cong., 1st Sess.)

The next step on the part of the government was the appointment, in July, 1849, by the Secretary of the Interior at Washington, of William Carey Jones* as confidential agent to investigate and report upon the subject of land titles in California, and for that purpose to examine the archives in Monterey, San Francisco or other places where they might be found, and, if necessary, to procure copies of documents in the City of Mexico. In September, Mr. Jones arrived at Monterey, in this State, where the territorial archives were deposited, and he proceeded with his examination, visiting San Jose, San Francisco, San Diego and Los Angeles in search for documents and other evidences of title. In December he proceeded to the City of Mexico. After conducting an examination there for a little over two weeks, he returned to Washington, and on April 10, 1850, he presented his report to the Secretary of the Interior, who at once transmitted it to the President, and by the President it was sent to Congress. (Senate Ex. Doc. No. 18, 31st Cong., 1st Sess.) The report of Mr.

*Father of Dean William Carey Jones of the School of Jurisprudence, University of California.

Jones covers 139 pages, and in some respects it is a remarkable document. The material was gathered at distant points under rather unfavorable conditions, and, considering its scope and detail, it was obtained in an incredibly short time. The report, itself, was carefully prepared, concise in form, and accurate in detail, and has always been referred to as an authority for the subject with which it deals. In this document Mr. Jones has incorporated a list of the private land grants in California found in the archives at Monterey. The list numbers 593 claims, but was stated not to be correct, by reason of the faulty condition of the records from which it was taken. Referring to the file of *expedientes* of grants, Mr. Jones says:

> This file is marked from No. 1 to No. 579, inclusive, and embraces the time between May 13, 1836, to July, 1846. The numbers, however, bear little relation to the dates. Some numbers are missing; of some there are duplicates—that is, two distinct grants with the same number. The *expedientes* are not all complete; in some cases the final grant appears to have been refused—in others, it is wanting. The collection, however, is evidently intended to represent estates which have been granted, and it is probable that in many or most instances the omission apparent in the archives is supplied by original documents in the hands of the parties, or by long permitted occupation.

In this report Mr. Jones foreshadowed the difficulties this government would encounter in dealing with these titles.

Legislation Dealing With Granted Lands.

The next move was for legislation providing for an examination that would segregate these granted lands from the public domain. The Legislature of the State of California, at its first session, in 1849, elected John C. Fremont and William M. Gwyn United States Senators. They received their credentials in December and proceeded to Washington, but it was not until September 10, 1850, the

day after the admission of California into the Union, that they were sworn in as members of the Senate. Soon after taking his seat, Mr. Fremont presented a bill providing for the settlement of private land claims in California. Mr. Gwyn offered a substitute, and Mr. Benton of Missouri offered an amendment to the substitute. Mr. Benton's amendment provided for the registration of all land grants with a register to be appointed by the President. The location, boundaries and extent of the grants were to be determined by the Surveyor General. The amendment provided for the ordering of grants into court when suspected of being fraudulent.

Commission on Spanish and Mexican Grants.

Mr. Gwyn's substitute for Mr. Fremont's bill passed and became the Act of March 3, 1851. (9 Stat. 631.) It provided for the appointment of a commission of three members, to continue for three years from the date of the Act. Each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments was required to present the same to the commission within two years, together with such documentary evidence and testimony of witnesses as the claimant relied upon in support of his claim; and all lands, the claim to which should not be presented to the commission within two years, were to be deemed a part of the public domain. It was provided that the commissioners and the District and Supreme Courts in deciding on the validity of any claim brought before them under the provisions of the act should be governed by the treaty, the law of nations, the laws, usages and customs of the government from which the claim was derived, the principles of equity and the decisions of the Supreme Court of the United States so far as they were applicable. An agent of the United States was provided for, to look after the interests of the United States in all cases; that is to say, to see that

the public domain was not invaded by illegal or spurious grants, or grants with excessive boundaries; and the United States Attorney was also to appear for the United States for the same purpose. An appeal lay to the United States District Court, upon the petition of the United States or the claimant, from an adverse report against either. An appeal was also allowed from the District Court to the Supreme Court of the United States.

In *Minturn* v. *Brower* (24 Cal. 644) the Supreme Court of California had before it the question of whether the holder of a perfect title to land in California, acquired by grant from either Spain or Mexico prior to the cession of the territory by Mexico to the United States, was required, under this statute, to submit such claim of title for confirmation to the Board of Commissioners appointed under the Act; or, failing to do so within two years after the date of the Act, as therein provided, the land so claimed should be deemed as part of the public domain of the United States. The court held that the holder of such a title might, if he so elected, submit his title to be passed upon by the Board of Commissioners, but was not bound to do so. The court held, further, that the legislation of Congress was ineffectual to impair or destroy perfect titles for failure to present them to the Board of Commissioners for their examination and judgment thereon, and that the title thus vested might be asserted and maintained like other perfect titles in the courts of the country.

Again, in 1874, the same court, in *Phelan* v. *Poyoreno* (74 Cal. 448), followed its previous rulings in *Minturn* v. *Brower,* holding, as before, that persons whose titles to lands were perfect at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the Board of Land Commissioners appointed under the Act of Congress of March 3, 1851, nor did they forfeit their lands by failure to present them to such board for confirmation; and that titles thus vested

might be asserted and maintained like other perfect titles in the courts of the country.

In *Botiller* v. *Dominguez* (130 U. S. 238, decided in 1889), the Supreme Court of the United States held that under this statute no title to land in California, under Spanish or Mexican grants, could have any validity unless submitted to and confirmed by the commission, or, if rejected by the commission, confirmed by the District or Supreme Court of the United States. A perfect title under Spanish or Mexican laws would avail nothing unless the claim should be so confirmed.

In *Barker* v. *Harvey,* (181 U. S. 481, decided in 1901), the Supreme Court reaffirmed the decision in *Botiller* v. *Dominguez,* holding that "the United States were bound to respect the rights of private property in the ceded territory, but that it had the right to require reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented, shall be considered abandoned."

We shall find presently that a different law was provided for New Mexico with respect to perfect titles.

Claims Adjudicated—Surveys.

The California commission was continued in existence until March 3, 1856—a period of five years. During that time 813 claims were presented for adjudication; 514 were confirmed, and the others rejected for fraud or for such serious defect that the claim was held not established, either as a legal or equitable claim. In some cases the claims were withdrawn. The final result, before the commission and on appeal to the District Court and Supreme Court, was the confirmation of 604 cases, the rejection of 190, and 19 were withdrawn. The amount of land claimed in all of these cases was more than 12,000,000 acres, or

nearly 20,000 square miles. The quantity of land in the confirmed grants was less than 9,000,000 acres.

Prior to 1860, patents were issued upon all claims finally confirmed by the commission or by the District or Supreme Court, upon presentation to the General Land Office at Washington of a certificate of such confirmation and a plat or survey of the land, certified and approved by the Surveyor General. All questions concerning the survey were passed upon by the General Land Office. The delay in this department and the unsatisfactory procedure in determining the difficult questions arising upon the surveys caused Congress to pass the Act of June 14, 1860 (12 Stat. 33). This Act authorized the District Court, upon the application of either party, to order the survey of a private land claim into court for examination and adjudication. Under this method of procedure, many surveys were ordered into court and an examination of the records will show that these final questions were as promptly determined as reasonably could be expected under all the circumstances; and that the location, extent and boundaries of the Spanish and Mexican private land claims in California, as between the government and the claimant, have long ceased to be a subject of controversy.

It is a fact, however, that the whole procedure has been severely criticised, but I think only by those who were not familiar with the defects in the Spanish and Mexican records and titles. These were defects growing out of loose and careless methods that made it most difficult to distinguish a genuine from a fraudulent grant—and there were many of the latter—and to determine the location, extent and boundaries of a claim, when found valid.

Method of Obtaining Grants.

The method of obtaining a land grant under the Mexican laws was simple in the extreme. The authority to make a grant to individuals was given to the Governors of the ter-

ritories, to the extent of eleven square leagues, or 48,712.4 acres. The grant of a larger tract could be made to *empresarios* for colonization purposes. There was no limit to the size of these latter grants. Anyone desiring to obtain a grant would present a petition to the Governor, stating his name, age, country and vocation, and the quantity and, as near as possible, the description of the land asked. At first it was usual to require a map or a rude plat of the land (called a *diseño*) to accompany the petition; but the practice fell into disuse, and the later grants contained only very general verbal descriptions. When the petition was presented, the next step was usually a reference made by the Governor on the margin of the petition to the prefect, or some local officer, to examine and report whether the land was vacant and could be granted without injury to third persons or the public, and sometimes also to know whether the petitioner's account of himself was correct. The reply of the prefect, or other local officer, called the *informe,* was written upon, or attached to the petition, and the whole returned to the Governor. If the *informe* was satisfactory, the Governor then issued the formal grant. In some cases where the Governor, himself, possessed the necessary information, there was no reference and no *informe,* and the grant immediately followed the petition.

The originals of the petition and *informe* were next filed with the secretary of the government in the archives, and with them a copy of the grant. The original grant was then delivered to the grantee. The papers on file in the archives were attached together so as to form one document constituting the evidence of the title, which was called the *expediente.* The next and final step was the approval of the grant by the territorial deputation, or, if the territory was erected into a department, by the departmental assembly. For this purpose it was the Governor's duty to communicate the fact of the grant to the legislative body, where it was usually referred to a committee which re-

ported at a subsequent session. Approval was seldom refused; but it was not infrequent for the Governor to omit communicating the fact that a grant had been made, and in such cases there was, therefore, no action on the part of the legislative body. In case the concurrence of the legislative body was refused, the Governor was required to appeal in favor of the grant to the supreme government at the City of Mexico.*

Evidence of Title.

These grants were made without any payment for the land. They were free gifts on the part of the government, made upon petition and no great care was taken to preserve or furnish the petitioner with full and complete evidence of his title. There was no system for recording titles in the local jurisdiction, such as we have in this country. The original grant in the hands of the grantee or his successors in interest, and the public archives, constituted the best evidence of a record title. In the absence of both of these evidences of title, the claim could not be sustained except upon clear and satisfactory proof of possession and actual occupation by the claimant or by his predecessor in interest during the existence of the former government, under a notorious and undisputed claim of title. (*United States* v. *Polack,* 1 Hoff. 284, 297; *Palmer* v. *United States,* 24 How. 125.) This latter alternative was the established, reasonable and necessary rule; but it was often found difficult for the claimant to supply the necessary proof, and proceedings were accordingly delayed in the effort of the court to do justice to the claimant.†

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*Report on the subject of Land Titles in California, by Willlam Carey Jones, Senate Ex. Doc. No. 18, 31st Cong., 1st Sess.; Hittell's History of California, vol. 2, p. 751.

†See 1 Cal. Jur. 499.

Location and Boundaries.

But the most baffling difficulties were to determine the location, extent and boundaries of a grant found to be valid, and these difficulties pertained to nearly all of them. No official surveys had ever been made by either the Spanish or Mexican governments, and, so far as appears, no professional surveyor had ever been in California prior to the cession. The nearest approach to a survey of a grant was for two men on horseback to take a lariat or rope of fifty varas in length (the equivalent of 137½ feet), with stakes long enough to be placed in position from on horseback. These two men, having been given directions to supposed landmarks, such as a distant hill, a peak or a tree, as corners to the grant, would set out on a survey. The initial stake being set by the first horseman, the second would set out at full speed to the limit of the lariat where the second stake would be set; and so they would continue until the land was surveyed. If it happened that the lariat was drawn through wet grass, it would lengthen under the strain as they proceeded and the grantee would then secure generous boundaries, and an enlarged area for the square leagues mentioned in the grant. This excess of quantity was, however, sustained by the courts upon the qualifying phrase in the grant "more or less."

When a deputy United States surveyor came to survey such a grant with chain and compass, he was not only confused by the uncertainty of the general directions for courses and distances, but by the extraordinary measurements if there happened to be any. It is no wonder the Land Department gave up the job of running boundary lines for these grants until instructions had been obtained from the court after a judicial inquiry upon such testimony as could be obtained upon the subject.

Boundary Between United States and Mexico — The Gadsden Purchase.

Returning now to our treaty relations with Mexico, we find that the boundary between the two countries west of the Rio Grande and east of the Colorado had not been well defined by the treaty. Mexico claimed considerable territory south of the Gila River in the present states of New Mexico and Arizona which the United States contended was included in the cession. The controversy led to an aggressive movement on the part of Mexico. General Santa Anna marched an army into the disputed territory to maintain the Mexican claim, and threatened a renewal of the war. Negotiations for the settlement of this controversy were entrusted to Captain James Gadsden as United States Commissioner, who, under the treaty of December 30, 1853 (known as the Gadsden Purchase), secured from the Mexican government a further cession of 29,670 square miles, or 18,988,800 acres, upon the payment of $10,000,000. This cession removed the controversy concerning the boundary in that locality.

The total amount thus paid for Mexican territory was $28,500,000 and the area secured was approximately 600,000 square miles, or about 384,000,000 acres. This territory now includes the whole of the States of California, Nevada, Arizona, Utah, New Mexico and parts of Colorado and Wyoming.

The Administration of the Law.

In answer to the criticism of the historians concerning the administration of this law in passing upon the private land claims in California, I offer the evidence of Mr. Theodore H. Hittell, who, it must be admitted by all, is a specially qualified witness by reason of his legal knowl-

edge and his familiarity with the subject. After reviewing the history of these claims in this State, he says:

There were a very few cases in which serious questions with reference to validity, extent or locality did not arise, and considering all things, it is doubtful whether any general plan such as would embrace all claims could have been devised much better than the one adopted. (Hittell's History of California, Volume 3, p. 693.)

The difficulty was in the evidence offered in support of the claims, and not in the court or its method of procedure. This, I think, appears conclusively when we examine the procedure adopted by Congress for the adjudication of the claims in the remainder of the ceded territories.

Grants in the Territory of New Mexico.

After the Gadsden Purchase, the next move in fulfillment of the treaty of Guadalupe Hidalgo was to provide for the ascertainment of private land grants in the territory of New Mexico, which at that time included all the territory in the present States of New Mexico, Arizona, Nevada, Utah and parts of Colorado and Wyoming.

Mr. H. H. Bancroft, in his history of New Mexico (contained in Vol. 17 of the Pacific Coast Histories, at page 643), referring to the private land grants in that territory, says:

In a general way, these New Mexican private claims, and the problems arising in connection with them, were the same as in California. There was the same careless informality in respect of title papers, and the same vagueness in boundaries; the grants were, however, more numerous, much more complicated by transfers and subdivisions, more varied in their nature as originating from different national, provincial, sectional and local officials; and the archives were much less complete.

As the United States had by the treaty assumed a single obligation with respect to all the grants in California and

New Mexico, it is to be regretted that a single judicial system was not promptly provided for the whole ceded territory. But Congress delayed; and finally, in 1854, after considering the procedure provided for grants in California, adopted for New Mexico the alternative method of making it the duty of the Surveyor General of the United States for the territory, under instructions from the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico, and to report on all such claims as originated before the cession of the territory under the treaty of Guadalupe Hidalgo. This report was to be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants. (Section 8 of the Act of July 22, 1854; 10 Stat. 308.)

The statute for New Mexico made a very different provision from that for California with respect to claims that should be presented for adjudication. In California all claims must have been presented to the commission, and, if not presented, the land claimed was restored to the public domain. But in New Mexico, if the title was perfect or claimed to be perfect at the date of the treaty, under Mexican laws, the claimant was not compelled to take it into court for confirmation. He might do so if he wished, or he might rely wholly on his Mexican title to maintain his right of ownership if assailed. (*Ainsa* v. *New Mexico & Arizona Railroad Company,* 175 U. S. 76.)

Titles in New Mexico.

What was a perfect title under the laws of either Spain or Mexico is not clear. In the Supreme Court of Texas it was held, in *Hancock* v. *McKinney* (7 Texas, 383, 449), with respect to a title under the law of Spain, that it was a grant requiring no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in*

praesenti; but if something remained to be done by the government or its officers, such title or right is imperfect, and until it receives the sanction of the political authority it cannot claim judicial cognizance as a perfect title. In *Gwin* v. *Calegaris* (139 Cal. 384, 387) it was held by the Supreme Court of California, with respect to a title originating under the Mexican law, that where a contract of sale of real estate called for a perfect title, the purchaser may insist upon a good title of record, and is not required to accept a title depending upon adverse possession or upon matters resting purely in parol.* Applying either of these definitions of a perfect title to the private land grants in California or New Mexico we will find but few titles that would be found perfect.

The grants in New Mexico, like those in California, were generally located within exterior boundaries embracing a much larger area than the grant called for in square leagues. In California, in early days, a person seeking vacant land upon which to locate and enter under the laws of the United States, finding a grant of this character, would settle upon it, claiming that he was only seeking to acquire title to a homestead in the surplus area. Such a settlement would generally lead to litigation or to a personal collision between the settler and the grant owner. Controversies of this nature grew in number and violence until we had squatter riots and political agitation that threatened to destroy the value of all grant titles, as well as the peace of the State.

Congressional Procedure.

To avoid this possible situation in New Mexico, Congress provided further in the act that until final action by Congress on such claims, all lands covered thereby, that is to say, all lands within the exterior boundaries of the grant

*See 1 Cal. Jur. 613.

were to be reserved from sale or other disposal by the government. This had the effect of practically withdrawing New Mexico from the public land domain until the titles to the private land claims were settled. This would have been a wise provision had Congress proceeded promptly to perform its duty under the act of 1854, but in this it failed.

The method pursued by Congress in discharging its obligation under the treaty was to refer the report of the Surveyor General to the committees on Private Land Claims of the two houses for examination and report; and upon the report of these two committees, with such evidence as there may have been taken by the Surveyor General and by the committees in the progress of their examination, Congress was supposed to act.

This procedure proved an utter failure. The difficulty of ascertaining the location, extent and boundaries of the land grants in that territory was the same as in California. The loose and careless methods of keeping the records had been the same, and the work of distinguishing a genuine from a fraudulent grant was even more difficult. Neither the Surveyor General nor the committees of Congress had the aid of a judicial system that would enable them to ascertain the necessary facts with respect to these grants and after a trial of twenty years the Surveyor General of the territory so reported.

Investigation by Public Land Commissioner.

The Commissioners of the General Land Office and the Secretaries of the Interior, in their annual reports to Congress, also called attention to the deplorable condition of the public and private land titles in New Mexico and urgently recommended that a new method of procedure should be provided whereby such titles could be determined. In 1879 Congress created a Public Land Commission to investigate and report upon the Public Domain

which included the subject of private land claims. This commission, in its report for the year 1880, referring to the statute under consideration, said: "The law was singularly defective in machinery for its administration, and it imposed no limitation of time in the presentation of claims and no penalty for failure to present. Its operation has been a failure, amounting to a denial of justice, both to the claimants and to the United States. After a lapse of nearly thirty years [continues the report] more than one thousand claims have been filed with the Surveyor General, of which less than one hundred and fifty have been reported to Congress, and of the number so reported Congress has finally acted upon only seventy-one. Of the limited number of cases finally confirmed, Congress has been compelled to confirm by terms of general description which have usually proved to include greater areas of land than Congress knowingly would have confirmed. The established rule of area under the Mexican colonization law was a maximum of eleven leagues to a claimant, being a little less than fifty thousand acres; but as illustrations of the natural result of confirmation without proper judicial investigation, *one confirmation* by Congress to *two claimants* [the Las Vegas grant] has proved to embrace one million acres, and another [the Maxwell grant] about one million eight hundred thousand acres."

Reports of Surveyor General and Committee on Private Land Claims.

The Surveyor General of the Territory of New Mexico, in his report for 1888, gave the following account of the wretched condition of land titles in that Territory:

At the close of another fiscal year Congress has done nothing which gives promise of a speedy and final settlement of Spanish and Mexican grant titles. This is deeply to be regretted, and the people of the Territory have abundant cause to complain. New Mexico became a part

of the Union more than forty years ago, and yet the promise of the Government to recognize and adjust these titles, which was solemnly made by the treaty of Guadalupe Hidalgo, has not been fulfilled. During the past fifteen or eighteen years her people have continuously importuned Congress for relief, but Congress has continually turned a deaf ear to their petitions. I repeat what I have said in a previous report, that if New Mexico was worth fighting for and adding to the territory of the United States it is worth governing and caring for by decent and civilized methods. The situation is a melancholy one and it invites a particular examination in the light of actual facts.

In 1890 the Committee on Private Land Claims of the House of Representatives submitted their report, in which it was stated:

There are now pending in Congress reports of surveyors generals upon private land claims in New Mexico, Arizona and Colorado, as follows:

In New Mexico, 107 claims, covering 8,704,785 acres; in Arizona, 15 claims, covering 414,833 acres; in Colorado, claims covering 229,814 acres; making a total of 9,349,433 acres. The number of acres for which no claim has been filed and the number of acres for which claims have been filed but which have been rejected are not included in these figures. It is, however, estimated that the total number of acres claimed under private land grants in New Mexico is about 10,000,000 acres; in Colorado, about 3,000,000 acres; in Arizona, about 500,000 acres; making in all the enormous territory of 13,500,000 acres, which is nearly equal to the combined areas of the States of Massachusetts, Connecticut and New Hampshire.

Court of Private Land Claims.

This report by the Congressional Committee of the house, concurred in by the committee of the Senate, is certainly a remarkable admission of the inefficiency of Congress in dealing with this problem, but the fact was so clearly established the admission could not be avoided. After much discussion in both houses, the Act of March

3, 1891, 26 Stat. 854, was passed, entitled, "An Act to establish a Court of Private Land Claims and to provide for the settlement of private land claims in certain states and territories." The act provides for a court consisting of one chief justice and four associate justices, with jurisdiction to hear and determine all claims to lands arising under the treaty with Mexico, in the States and Territories mentioned, which had not already been confirmed by act of Congress or otherwise finally decided by lawful authority. The act is elaborate in its details and gives the court full equipment and authority, with the necessary officers to discharge the duties provided in the act, with an appeal from decrees to the Supreme Court of the United States.

The life of the court was to continue until December 31, 1895—a period of a little over five years. It was continued in existence until June 30, 1904—a period of a little over thirteen years, when it had completed the work for which it was created. The court had heard all claims presented, numbering about 300. These claims called for about 30,000,000 acres of land; while claims were confirmed to the amount of about 10,000,000 acres. The difference of 20,000,000 is partly accounted for by the rejection of invalid claims and partly by the segregation of the surplus area from valid grants located within exterior boundaries of much larger area.

Conclusion.

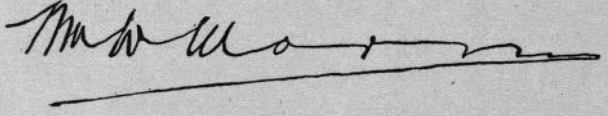
After fifty-six years, the United States had discharged its obligation under the treaty of Guadalupe Hidalgo with respect to the private land claims in the province of New Mexico. The record is not one for which we can claim much credit; but, on the other hand, it is not one for which we can take much blame. The fault has not been entirely with the United States or its courts. The fundamental error was with the Mexican territorial authorities who failed to give to their grantees proper evidence of the

titles to the lands granted. It was an error that prevailed in a majority of the cases, both in California and in New Mexico, and entered into all of the proceedings relating to the land claims and delayed their progress. Delay in such cases was unavoidable in the effort of the court to do justice to the claimants.

Another serious fault on the part of the Mexican authorities was their neglect and lack of system in preserving and recording the evidence of titles in their archives. When the original grant had been lost or destroyed (which was frequently the case), the next best evidence was the archives and when these failed to furnish any satisfactory evidence of the title, the complainant was compelled to resort to the evidence of long, open and continued possession and occupation of the granted land under a claim of title. This situation usually required a long and tedious investigation, ending, in many cases, in doubtful and unsatisfactory conclusions as to the validity of the grant, as well as to its location, extent and boundaries.

Under our public land system, requiring careful surveys, accurate descriptions and a full record of all the proceedings from the entry of the land to the patent, no such delay could possibly have occurred. Titles of this character are passed upon by the courts every day, without any more delay than is required to pass a check or a draft through a bank. With such a system, the Spanish and Mexican land claims referred to in the treaty could have been disposed of by the courts in less than two years.

This brings me to the conclusion I have long entertained: That the judicial system for determining controversies of this character, while it is not perfect and has incurred some just criticism, is on the whole the best that has yet been devised, and generally may be safely depended upon for the prompt and efficient administration of justice.



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